No. 17-55435

IN THE

United States Court of Appeals for the Ninth Circuit

JOHN DOE, I, et al.,

Plaintiffs - Appellants,

v.

NESTLÉ S.A.; NESTLÉ USA, INC.; NESTLÉ IVORY COAST; CARGILL INCORPORATED COMPANY; CARGILL COCOA; CARGILL WEST AFRICA, S. A.; ARCHER DANIELS MIDLAND COMPANY,

Defendants - Appellees.

From the United States District Court for the Central District of California
Case No. 2:05-cv-05133-SVW-MRW
The Honorable Stephen V. Wilson

PETITION FOR REHEARING AND REHEARING *EN BANC* OF DEFENDANT-APPELLEE NESTLÉ USA, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Nestlé USA, Inc. hereby files its corporate disclosure statement as follows. Defendant-Appellee Nestlé USA, Inc. is a wholly owned subsidiary of Nestlé Holdings, Inc., which is a wholly owned subsidiary of NIMCO US, Inc., which is a wholly owned subsidiary of Nestlé S.A., a publicly traded Swiss corporation, the shares of which are traded in the United States in the form of American Depositary Receipts. No other publicly traded company has a 10% or greater ownership stake in Nestlé USA, Inc.

Dated: November 27, 2018

Respectfully submitted,

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ADDENDUM

[1] "Op." refers to the Panel Decision; "E.R." refers to the Excerpts of Record.

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INTRODUCTION & RULE 35(B) STATEMENT

The U.S. Supreme Court has repeatedly cautioned that courts must exercise restraint in permitting Alien Tort Statute ("ATS") suits, particularly when they seek to police alleged activities occurring abroad. Nonetheless, a panel of this Court recently revived a thirteen-year-old ATS claim against U.S. manufacturers and suppliers of cocoa products based on implausible and indeterminate allegations relating to alleged wrongs that occurred overseas at the hands of unidentified foreigners. Because the panel's decision also conflicts with Fifth, Eleventh, and Ninth Circuit precedent, *en banc* review is essential.

This petition for rehearing is not the first in this litigation's history. Four years ago, a panel reversed the dismissal of Plaintiffs' prior complaint, holding that mere allegations of a desire to profit in the cocoa industry were sufficient to allege the *mens rea* for aiding and abetting alleged child labor perpetrated in Côte d'Ivoire by independent foreign farmers, despite Plaintiffs' concession that Defendants were not the alleged enslavers and lacked the intent to harm children. That panel left many other issues, including extraterritoriality, undecided. And, despite Plaintiffs' failure to allege even a single viable or reasonable claim, the panel allowed Plaintiffs to file the second amended complaint at issue here. Nine judges dissented from the denial of *en banc* review of the prior panel decision. The lack of two additional votes for *en banc* review caused Defendants to endure years of additional litigation and

reputational damage, all for no purpose: Plaintiffs still have not alleged a viable ATS claim against Nestlé USA.

The need for *en banc* review of this decision is therefore paramount. The decision perpetuates this baseless suit by holding that a plaintiff may overcome the extraterritoriality bar through vague allegations of payments to entities overseas. It thereby contravenes the Supreme Court's guidance and creates a split with the Fifth and Eleventh Circuits, both of which appropriately hold that allegations of payments from the United States are insufficient to overcome the extraterritoriality bar.

The decision also breaks from this Circuit's precedent. Notably, just four years ago, in *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014), this Court cautioned against inferring that "acts [ATS plaintiffs] allege occurred" abroad "could not have occurred' without support from Defendants' 'U.S. offices.'" *Id.* at 592 n.6. But the panel here did just that: It assumed that vaguely alleged payments must have "originated" from the United States, even though Plaintiffs themselves did not say so. The panel also broke from this Circuit's Rule 8 jurisprudence, which refuses to infer nefarious conduct based solely on allegations more plausibly described as normal business practices. *See*, *e.g.*, *Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990 (9th Cir. 2014). Here, the panel "infer[red]" that allegations of routine payments and oversight of foreign operations generally were "kickbacks" to slavers directed from the United States.

Nor is the extraterritoriality holding the only reason *en banc* relief is necessary: The decision also reinforces the existing circuit split regarding corporate liability under the ATS, despite the Supreme Court's guidance to the contrary in *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018). And the panel refused to consider whether Plaintiffs have Article III standing to bring this suit, notwithstanding its independent obligation to assure itself of its own jurisdiction.

Moreover, despite acknowledging that Plaintiffs' third complaint was marred by the presence of impermissible group pleading, the panel allowed this thirteen-year-old case to continue. That is contrary to *Mujica*, which held that Plaintiffs should *not* be given another opportunity to amend insufficient ATS allegations when it is clear that amendment will be futile. Here, that is obviously the case because—more than a decade after they filed this suit—Plaintiffs *still* cannot specify what was allegedly done by Nestlé USA (a food-and-beverage manufacturer with a Swiss parent company), as opposed to Cargill (a cocoa supplier with headquarters in the United States), or any of the other defendants improperly named in the complaint, including Nestlé USA's Swiss parent and Ivorian affiliate.

Forced labor is a heinous practice that Nestlé USA abhors, explicitly prohibits, and which it has worked diligently to combat. Having failed to allege facts implicating any wrongdoing by Nestlé USA, which does not own Ivorian farms and

is not even a cocoa supplier, Plaintiffs should not have yet another opportunity to drag Nestlé USA's reputation in the mud for yet another futile amendment.

The panel erred in glossing over these flaws, distorting the extraterritoriality standard, and offering an additional opportunity to amend. If the decision stands, it not only will create multiple legal conflicts, but also will "discourage[] American corporations from investing abroad," depriving developing countries of foreign "investment that contributes to the economic development that so often is an essential foundation for human rights." *Jesner*, 138 S. Ct. at 1406 (Kennedy, J.).

En banc review is necessary.

BACKGROUND

Plaintiffs allege they were forced to harvest cocoa on Ivorian "farm[s] and/or farmer cooperative[s]" from 1994 to 2000 or 2001. E.R. 135-36, 158-62 (SAC ¶¶ 6-11, 70-75). Plaintiffs claim they were victimized by criminals in Mali and Côte d'Ivoire, none of whom are defendants here or are alleged to have any relationship with Nestlé USA. E.R. 158-61 (SAC ¶¶ 70-75). Instead, under an aiding-and-abetting theory, Plaintiffs sued seven companies: Cargill and two of its affiliates; Nestlé USA, Nestlé USA's Switzerland-based parent, Nestlé S.A., and Nestlé Côte d'Ivoire; and Archer Daniels Midland ("ADM"), another cocoa supplier, previously dismissed from the case, D.Ct. Dkt. 229.

Proceedings Involving Plaintiffs' First Two Complaints. Plaintiffs filed their original complaint on July 14, 2005, and an amended complaint four years later, Dkt. 106. On September 8, 2010, the district court dismissed the First Amended Complaint, concluding that Plaintiffs' allegations did not allege the *actus reus* or *mens rea* for aiding-and-abetting, and that the ATS does not permit corporate liability. *Doe v. Nestlé S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010).

Plaintiffs appealed, and in 2014, after supplemental briefing to address *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), a divided panel of this Court—with Judge Rawlinson dissenting—reversed in part and remanded for further proceedings. *Doe I v. Nestlé USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014). The 2014 panel held that corporations could be liable under the ATS and that Plaintiffs had pleaded *mens rea*, notwithstanding Plaintiffs' admission that Defendants did not have the subjective motive to harm children and had policies against forced labor. *Id.* at 1023, 1025. Although Plaintiffs had been given the opportunity to engage in supplemental briefing about *Kiobel*, the panel directed Plaintiffs to amend to address the extraterritoriality standard announced in *Kiobel* and to further address *actus reus*.

The Court denied *en banc* review, over a dissent by Judge Bea, joined by many members of this Court, explaining that the panel's decision "flout[ed]" the Supreme Court's instruction that federal courts "operate under a 'restrained conception' of the extent of" liability for violations of customary international law. *Doe I v. Nestlé,*

S.A., 788 F.3d 946, 947 (9th Cir. 2015). Nestlé USA filed a petition for certiorari, which was denied. 136 S. Ct. 798 (2016).

Plaintiffs' Second Amended Complaint. On July 16, 2016, Plaintiffs filed their Second Amended Complaint (the "SAC"). It referenced Nestlé USA in only three paragraphs, alleging only that Nestlé USA "is a wholly-owned subsidiary of Nestlé S.A." and "[i]s one of the largest purchasers, manufacturers, and retail sellers of cocoa products in North America." E.R. 133, 138, 143 (SAC ¶¶ 1, 20, 35).

The SAC made a number of other allegations against "Nestlé" in general, declining to specify whether Plaintiffs meant Nestlé USA, or Nestlé's Swiss parent or Ivorian affiliate. Still other allegations referred to "Defendants" in general. Thus, Plaintiffs alleged that "***Nestlé*** regularly had employees from their Swiss and U.S. headquarters inspecting their operations in Côte d'Ivoire," E.R. 143 (SAC ¶ 35 (emphasis added)) and that "***Defendants*** control [cocoa-production] conditions by providing local farmers and/or farmer cooperatives with … ongoing financial support, including advance payments and personal spending money to maintain the farmers' and/or the cooperatives' loyalty," E.R. 144 (SAC ¶ 37) (emphasis added). Plaintiffs also alleged that Nestlé's Swiss parent—Nestlé S.A.—controlled all of Nestlé USA's actions and that "Nestlé" maintained policies against forced labor. E.R. 141, 148-51 (SAC ¶¶ 30, 52-59).

2017 District Court Decision. On March 2, 2017, after presiding over the case for more than twelve years, Judge Wilson dismissed the SAC and denied Plaintiffs' request to be given yet another opportunity to amend. Judge Wilson explained that "the complaint seeks an impermissible extraterritorial application of the ATS," E.R. 4, and the allegations regarding payments to farmers represent "activities that ordinary international businesses engage in." E.R. 8. In denying further leave to amend, Judge Wilson stressed that "the Court need look no further than *Mujica* to dismiss this case without leave to amend." ER 13. Plaintiffs "amended their complaint to account for *Kiobel* and had full briefing, including supplemental briefs, since *Kiobel* …. Thus, this court does 'not believe that granting Plaintiffs leave to amend would serve any purpose.'" E.R. 14 (quoting *Mujica*, 771 F.3d at 593).

Panel Decision. On October 23, 2018, after receiving supplemental briefing from all parties about *Jesner*, a panel of this Court reversed the district court's extraterritoriality ruling and remanded.

First, the panel again ruled that the ATS permits suits against domestic corporations. Op. 8-9.

Second, applying the "focus" test for extraterritoriality, the panel held that the "focus" of an aiding-and-abetting claim is the aiding-and-abetting conduct, not the underlying tort. Op. 11-12.

Third, based on a "narrow set of domestic conduct" that it found relevant to the focus inquiry, the panel held that Plaintiffs had overcome the extraterritoriality bar. The panel pointed to allegations that unspecified "Defendants" provided spending money to farmers, and "infer[red] that the personal spending money was outside the ordinary business contract" and "more akin to 'kickbacks.'" Op. 13. The panel also pointed to separate allegations that "Defendants'" U.S. employees "regularly inspected operations in" Côte d'Ivoire. Op. 13.

Finally, the panel did not rule on Nestlé USA's argument that Plaintiffs had not alleged *actus reus*, and instead remanded for Plaintiffs to correct "problematic" group pleading. Op. 14. The panel also failed to address Nestlé USA's argument that Plaintiffs had not established Article III standing because their alleged injuries are not fairly traceable to Nestlé USA.

ARGUMENT

I. The Panel's Decision Splits from the Precedent of the Supreme Court, Its Sister Circuits, and this Circuit, Dramatically Diluting the Bar on Extraterritorial ATS Claims.

A. The Extraterritoriality Holding Ignores Supreme Court Precedent and Creates a Split with the Fifth and Eleventh Circuits.

The Supreme Court repeatedly has stressed the importance of exercising judicial restraint and caution in transnational matters, particularly ATS suits. *See*, *e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 ("common law … counsels

restraint in judicially applying internationally generated norms"). In *Kiobel*, the Court held that the presumption against extraterritoriality applies to the ATS. More recently, the Supreme Court emphasized the "perils" of permitting any ATS suit with tenuous links to the United States, and reminded courts that they "must exercise 'great caution'" before permitting ATS suits to go forward. *Jesner*, 138 S. Ct. at 1403, 1406. Indeed, those suits implicate delicate "foreign-policy and separation-of-powers concerns" best left to the political branches. *Id.* at 1403. Here, the panel ignored the Supreme Court's guidance, applying an incorrect version of the "focus" test for extraterritoriality, breaking from its sister circuits in the process.

As to the standard, the panel first refused to hold that the "focus" of an ATS claim is the locus of the injury, Op. 11-12, despite black-letter law establishing that "the local law of the state where the injury occurred determines the rights and liabilities of the parties," Restatement (Second) of Conflict of Laws § 146 (emphasis added); *see also Sosa*, 542 U.S. at 705 ("tort cases" generally apply "the law of the place where the injury occurred"). The panel instead insisted that the "focus" could include *any* domestic conduct that might be considered aiding and abetting. Op. 12-13.

Then, rather than exercising "caution" in elaborating this standard, the panel held that the extraterritoriality bar could be overcome based on scant allegations of domestic conduct that other circuits have repeatedly found insufficient. The panel

pointed to only *two* allegations to hold that the suit is not extraterritorial: alleged payments by unspecified "Defendants" of "spending money" to Ivorian farmers and alleged visits by "Defendants'" unidentified "employees" to Côte d'Ivoire. Op. 13.

This conduct is not even alleged to have occurred in the United States. Plaintiffs never have claimed that the payments originated in the United States, and the alleged visits obviously occurred on foreign soil. *See* E.R. 144 (SAC ¶¶ 35-37). But even if this conduct could somehow be considered domestic, it simply is not enough to overcome the Supreme Court's prohibition on extraterritorial ATS suits.

It is therefore no surprise that the panel's decision splits from the precedent of the Fifth and Eleventh Circuits. Both courts have held that allegations of payments to alleged malefactors overseas are not sufficient to overcome the extraterritoriality bar. Thus, in *Adhikari v. Kellogg Brown & Root, Inc.*, the Fifth Circuit held that payments by the defendant to a subcontractor who allegedly trafficked plaintiffs were insufficient to state a domestic ATS claim. 845 F.3d 184, 190-91, 197-99 (5th Cir. 2017). Plaintiffs "failed to connect the alleged international law violations to these payments or demonstrate how such payments—by themselves—demonstrate that [the defendant's] U.S.-based employees actually engaged in" "trafficking" or "forc[ed]" labor. *Id.* at 198.

Similarly, in *Baloco v. Drummond Co.*, the Eleventh Circuit declined to hold that the extraterritoriality bar was overcome by allegations that the U.S. defendant

"elected to back" an entity in Columbia that "killed civilians." 767 F.3d 1229, 1236, 1238 (11th Cir. 2014). Because there was no "express agreement" that the defendant was providing the funding for the crimes, these allegations were not sufficient. *Id.* at 1236-39. And in *Cardona v. Chiquita Brands Int'l, Inc.*, the Eleventh Circuit went even further, holding that plaintiffs could not move forward with a suit alleging that the defendant "review[ed], approv[ed], and conceal[ed] a scheme of payments and weapons shipments to Colombian terrorist organizations" from within the United States. 760 F.3d 1185, 1192 (11th Cir. 2014) (Martin, J., dissenting) (recounting allegations). The Eleventh Circuit explained that the claim was impermissibly extraterritorial because "there [was] no allegation that any torture occurred on U.S. territory." *Id*. at 1191.

The panel's decision in this case conflicts with these decisions, each of which declined to infer that payments to commercial counter-parties—or even a political faction responsible for the complained-of atrocities—were sufficient to state a domestic ATS claim. The panel here focused on a generalized allegation that unspecified "Defendants" "provid[ed] local farmers and/or farmer cooperatives with … personal spending money," E.R. 144 (SAC ¶ 37), and from that inferred that "Defendants" "perpetrated [violations of international law] from headquarters in the United States."

The two Second Circuit opinions the decision relies on are far afield because both involve alleged financial transactions that were illicit on their face. Op. 12; *compare* E.R. 9 n.7 (district court decision). The payments in *Mastafa v. Chevron Corp.*, 770 F.3d 170, 174-75, 190 (2d Cir. 2014), allegedly violated the U.N. Oil-for-Food program and constituted "kickbacks to the []Saddam Hussein[] Regime." Likewise, in *Licci by Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201, 217-18 (2d Cir. 2016), the defendant's "financing arrangements" in New York were allegedly made to fund "Hezbollah's" terrorist activities. There simply is no comparison with Plaintiffs' assertions that "Defendants" gave spending money to Ivorian farmers.

This Court should grant rehearing *en banc* to align this Circuit's law with that of the Supreme Court and its sister circuits.

B. The Panel's Decision Breaks from This Court's Own Precedent.

The panel's extraterritoriality analysis also splits with multiple precedents of *this* Circuit.

First, in conflict with *Mujica*, the decision assumes U.S.-based conduct from the fact that U.S. corporations are involved. In *Mujica*, the plaintiffs alleged that a U.S.-based oil company violated the ATS by "provid[ing]" "material and logistical support," "finan[cing]," and "other assistance" to the Colombian air force in connection with a bombing of a village to "further" the defendant's "commercial

interests" in Colombia. 771 F.3d at 584-85, 592. This Court, however, refused to infer "that the acts [plaintiffs] allege occurred in Colombia 'could not have occurred' without support from Defendants' 'U.S. offices.'" *Id.* at 592 n.6. That is because "the Supreme Court has never suggested that a plaintiff can bring an action based solely on extraterritorial conduct *merely because* the defendant is a U.S. national." *Id.* at 594.

By contrast, here the panel assumed that the alleged payments to farmers "originated" in the United States, Op. 13, though the relevant paragraph of the complaint makes no mention of the United States *at all*. E.R. 144 (SAC ¶ 37). In other words, the decision does precisely what the *Mujica* Court forbade: It assumes that an activity that occurred abroad must have been orchestrated from the Defendants' U.S. offices. Op. 13.

Nor is that the only improper assumption the panel made. The decision also concludes that payments to "Defendants'" commercial counterparties are "akin to [illicit] kickbacks," an allegation found nowhere in the SAC. Rather, the pleadings allege that unspecified "Defendants" gave the farmers "spending money." E.R. 144 (SAC ¶ 37). The panel held that its obligation to draw "all reasonable inferences" in favor of Plaintiffs permitted it to reimagine these payments as "kickbacks" "outside the ordinary business contract." Op. 13. But that kind of creative redrafting of a complaint is contrary to this Circuit's—and the Supreme Court's—basic

precedent regarding pleading standards. Under *Twombly* and *Iqbal*, a court cannot accept a plaintiff's "'favored explanation'" for a set of facts that—by themselves—amount to nothing more than routine business conduct. *Eclectic Properties*, 751 F.3d at 996.

An inference of unlawful conduct is appropriate only if the complaint contains additional, plausible allegations negating "obvious," "innocuous" explanations for the defendant's conduct. *Id.* at 997-99 (plaintiffs failed to "plead … facts … show[ing] [the alleged illicit conduct] … was not typical, appropriate, or the product of legitimate" business decisions); *see also*, *e.g.*, *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1129–30 (9th Cir. 2015) (courts will not "infer an anticompetitive agreement when factual allegations 'just as easily suggest rational, legal business behavior'"); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 (9th Cir. 2015) (same).

Here, the complaint does not contain anything to negate the far more likely and innocuous explanation for the alleged conduct. And certainly Plaintiffs supplied no factual allegations justifying an inference that any alleged payments were "outside the ordinary business contract"; still less that these were "kickbacks" intended to support child slavery. Op. 13; *see* E.R. 144 (SAC ¶¶ 36-37). In fact, Plaintiffs even conceded that Defendants are not the enslavers, have policies against enslavement, and lack the intent to harm children. *Doe I*, 766 F.3d at 1025;

E.R. 148-151 (SAC ¶¶ 52-57). Rather, the Complaint itself provided an "'obvious alternative explanation'" for these payments, *Eclectic Properties*, 751 F.3d at 996: If made at all, they were intended to "maintain the farmers' and/or the cooperatives' loyalty as exclusive suppliers." E.R. 144 (SAC ¶ 37); Oral Argument Video 37:01 (Cargill's counsel referring to payments as an "economic inducement"). Indeed, for international suppliers like Cargill and ADM, maintaining such supplier relationships is a common business occurrence across industries. *See*, *e.g.*, *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1188 & fn.2 (9th Cir. 2016) ("exclusive dealing arrangements provide 'well-recognized economic benefits'").

In short, the decision takes a vague claim that unspecified "Defendants" provided spending money from an unspecified country to farmers in Côte d'Ivoire and converted it into the lynchpin of an unsupported theory of illegal financing of child slavery from the United States, disregarding numerous precedents along the way. *En banc* rehearing is necessary to prevent this distortion of law regarding extraterritoriality and pleading standards.

II. There Are Multiple Additional Reasons to Grant *En Banc* Review.

The opinion also provides numerous other justifications for *en banc* review.

First, the panel again embraced corporate ATS liability. Op. 8. But, as Judge Bea explained in his prior dissenting opinion, corporate ATS liability is incompatible with the Supreme Court's instruction "that federal courts have no congressional

mandate to seek out and define new and debatable violations of the law of nations" for corporations. *Nestlé*, 788 F.3d at 955-56. *Jesner* reinforces that analysis, emphasizing that courts must exercise caution in deciding "whether … to mandate a rule that imposes liability upon artificial entities like corporations." 138 S. Ct. at 1402-03 (citing *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (no *Bivens* corporate liability)). *Jesner* thus makes clear that it is time for this Court to revisit its precedent recognizing corporate liability.

Second, the decision fails to address Nestlé USA's argument that Plaintiffs had not pled Article III standing. There are no allegations that any injury Plaintiffs allegedly suffered was fairly traceable to Nestlé USA: Even accepting Plaintiffs' limitless aiding-and-abetting theory, Plaintiffs do not allege that Nestlé USA had any "direct relationship" with farmers in West Africa engaging in child-slave labor, let alone the ones that trafficked Plaintiffs. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 643 (S.D. Tex. 2010). Absent such allegations, Plaintiffs cannot plausibly claim that any action by Nestlé USA, which is not even alleged to be a cocoa supplier, had anything to do with injuries they allegedly suffered. By skipping straight to the merits, the panel ignored the requirement that the Court first "must assess the [plaintiffs'] … standing." *Nw. Requirements Utilities v. FERC*, 798 F.3d 796, 804 & n.5 (9th Cir. 2015); *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495, 498

(9th Cir. 1977). If allowed to proceed, Plaintiffs will have succeeded in litigating this case for more than a decade—harming Nestlé USA's reputation—without ever proving the legal right to sue Nestlé USA in federal court.

Third and finally, the panel recognized that the SAC could not support ATS liability because "it is not possible on the current record to connect culpable conduct to defendants that may be sued under the ATS." Op. 14. But the panel nonetheless gave Plaintiffs yet another opportunity to amend, despite the obvious futility. This remand with leave to amend directly conflicts with *Mujica*, where this Court declined to remand to give plaintiffs an opportunity to replead their insufficient ATS claims. The *Mujica* Court recognized that plaintiffs had filed their ATS suit before *Kiobel* and that "*Kiobel* worked a significant change in the legal prerequisites for an extraterritorial ATS claim," but held that remand would be inappropriate because "at th[at] stage of the litigation—i.e., prior to discovery"—Plaintiffs could not plead sufficient facts regarding the defendant, having long failed to do so. 771 F.3d at 592-93.

The same is doubly true here: Plaintiffs already have been given the opportunity to amend that was denied to the *Mujica* plaintiffs; the prior panel remanded to allow Plaintiffs to amend in light of *Kiobel*, *Doe I*, 766 F.3d at 1026-29, and Plaintiffs have had ample opportunity to address the Supreme Court's more recent ATS and extraterritoriality precedents. Yet Plaintiffs have offered *no* relevant

factual allegations regarding Nestlé USA. Instead, Plaintiffs continue to lodge vague, generalized allegations against "Defendants" in general or against "Nestlé" collectively. If Plaintiffs had at their disposal any factual matter suggesting that Nestlé USA—a U.S.-based, food-and-beverage manufacturer that allegedly purchased cocoa through a supply chain many steps removed from Ivorian farms, farmers, or Plaintiffs—was somehow responsible for Plaintiffs' injuries, Plaintiffs would have and should have alleged that information in one of the three complaints already filed.

The panel justified its remand by citing to the recent release of *Jesner*, but—as in *Mujica*—a new Supreme Court decision does not support a remand where Plaintiffs clearly cannot plead sufficient facts to state an ATS claim (and Plaintiffs already were given the opportunity to submit supplemental briefing on *Jesner*). The impropriety of remand is obvious here, where the only thing the SAC alleges about Nestlé USA is that it "purchase[s], manufacture[s], and [sells]" cocoa products. E.R. 138 (SAC ¶ 20).

While Plaintiffs' allegations against *all* Defendants fall dramatically short, those against Nestlé USA particularly are lacking. While Plaintiffs allege that Cargill and ADM process cocoa beans from Côte d'Ivoire to provide "cocoa products to California manufactures," there are no similar allegations against Nestlé USA. E.R. 138-39 (SAC ¶¶ 22-24). And the *only* allegation tying any child

slave directly to *any* defendant is Plaintiffs' allegation that "19 Malian child slaves were rescued" from a farm that did business with Cargill. E.R. 144 (SAC ¶ 39). Plaintiffs have never alleged any similar connection to Nestlé USA, and Plaintiffs should not be allowed yet another, futile remand.

CONCLUSION

Nestlé USA respectfully requests rehearing or rehearing *en banc*.

Dated: November 27, 2018

Respectfully submitted,

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Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 17-55435

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

☒ Contains 4,172 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

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Signature of Attorney or Unrepresented Litigant: s/ Theodore J. Boutrous, Jr.

Date: 11/27/2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 27, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 27, 2018

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.